87-1984

In The

Supreme Court Of The United States

Supreme Court, U.S.
FILED
JUN 2 1988
JOSEPH F. SPANIOL, JR.

OCTOBER 1988 TERM

STEPHEN R. THOMAS,

Petitioner,

v.

SEABOARD SYSTEM RAILROAD, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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Raymond H. Strople
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QUESTIONS PRESENTED FOR REVIEW

I

IN A FEDERAL EMPLOYERS' LIABILITY ACT CASE DOES THE INJURED RAILROAD EMPLOYEE HAVE A RIGHT TO HAVE THE ISSUE OF THE RAILROAD'S NEGLIGENCE REMOVED FROM THE JURY WHERE REASONABLE PEOPLE COULD ONLY CONCLUDE THAT THE RAILROAD WAS NEGLIGENT.

II.

IN A FEDERAL EMPLOYERS' LIABILITY ACT CASE SHOULD THE COURT REMOVE THE ISSUE OF LIABILITY FROM THE JURY WHERE THE RAILROAD EMPLOYEE'S EVIDENCE SHOWS AS A MATTER OF LAW THAT THE RAILROAD'S NEGLIGENCE WAS A CAUSE IN WHOLE OR IN PART OF THE RAILROAD EMPLOYEE'S INJURY.

III.

IN A FEDERAL EMPLOYERS' LIABILITY ACT CASE DOES THE INJURED RAILROAD EMPLOYEE HAVE A RIGHT TO HAVE THE COURT

RULE AS A MATTER OF LAW THAT THE INJURED EMPLOYEE WAS FREE OF CONTRIBUTORY NEGLIGENCE WHERE REASONABLE PEOPLE COULD ONLY CONCLUDE THAT THE INJURED RAILROAD EMPLOYEE WAS NOT NEGLIGENT.

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REFERENCE TO OFFICIAL AND UNOFFICIAL OPINIONS

This case has not been reported in any official or unofficial reports either at the trial level or at the appellate level.

GROUNDS OF JURRISDICTION

The Circuit Court of Portsmouth on December 29, 1986 entered judgment on the jury verdict for the Seaboard System Railroad. A Petition for Appeal was timely filed by Thomas with the Supreme Court of Virginia and the Petition for Appeal was denied by the Supreme Court of Virginia on January 25, 1988. (See Appendix p.vii) A Petition for Rehearing was filed in the Supreme Court of Virginia and the rehearing was denied by the Supreme Court of Virginia on March 4, 1988. (See Appendix p. ix-x) This Petition for Writ of Certiorari is timely filed in accordance with 28 U.S.C. 2101(c)

This Court has jurisdiction in accordance with 28 U.S.C. Section 1257(3), which provides:

> By Writ of Certiorari, where the validity of a treaty

or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commissioned held or authority exercised under, the United States.

STATUTE INVOLVED

Section 51 of the Federal Employers' Liability Act provides, "Every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then the next of kin depending upon such employee, such injury or death resulting in whole or in part from the negligence in any of the officers, agents or

employees of such carrier or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharfs or other equipment. See 45 U.S.C. Section 51 Federal Employers' Liability Act.

STATEMENT OF CASE

Thomas filed a Motion For Judgment against the Seaboard under the Federal Employers' Liability Act seeking damages for an on the job injury that he sustained while in the employ of the Seaboard on January 17, 1985 due to the failure of the Seaboard to furnish him with a safe place to work. The Seaboard denied that Thomas was injured, denied that he was negligent and alleged that Thomas was negligent. The matter was tried before a jury in the Circuit Court of Portsmouth on September 8, 9, 10, and 11, 1986. Before the matter was submitted to the jury Thomas asked the Court to grant Instruction 1-A, which provided that the Seaboard was negligent as a matter of law and asked the Court to grant Instruction 3-A which provided that Thomas was free of negligence as a

matter of law (See Appendix p. x-xi).

Instruction 1-A and 3-A were denied by the Court (See Appendix xii). The jury then returned a verdict for Seaboard. Thomas then moved to set aside the verdict and award him a new trial on the basis the verdict was contrary to the law and evidence and the error in refusing to grant certain instructions (See Appendix p. iv, v and vi). The Circuit Court on December 29, 1986 overruled Thomas' post-trial motion and affirmed the jury verdict (See Appendix vii-viii). Thomas then filed his Petition For Appeal, which was timely filed, and argued before the Supreme Court of Virginia that the jury verdict was plainly wrong and without evidence to support it and asked the Court to set aside the verdict and award Thomas a new trial on damages. Thomas also argued in the Petition For

Appeal that the Court should have ruled that Thomas was free of negligence as a matter of law and that the Seaboard was negligent as a matter of law. The Petition For Appeal was denied on January 25, 1988 (See Appendix p. viii). A Petition For Rehearing was then filed where it was argued that the jury verdict was plainly wrong and without evidence to support it and asked that the verdict for the Seaboard should be set aside and award Thomas a new trial on damages. The Petition For Rehearing was denied on March 4, 1988 (See Appendix p. ix-x).

Page references in this Petition will be to the transcript unless the matter has been printed in the Appendix attached, in which case the reference will be to the Appendix filed with this Petition.

Thomas, a railroad brakeman, reported to work at the Brewer Yard in Danville, Illinois on January 17, 1985 at 2:30 a.m. Thomas boarded the caboose with Peckinpaugh, a fellow employee. The weather was clear and the temperature was 20° (T-53). The train could not leave because the air had to build up to 75 pounds in the air brakes in the caboose (T-136, 196). When Thomas boarded the caboose the lights and radio were not working (T-37, 38, 196-197). The battery had enough power to light the red light at the rear of the caboose, but would not light the lights inside the caboose. A trainmaster for the Seaboard, a supervisor of Thomas, boarded the caboose while they were waiting for the air to build up in the caboose and was aware that the lights were not on and the radio was not working

(T-198, 38, 39). Nevertheless, the trainmaster instructed Thomas to leave with the lights and radio not working.

The train left the Brewer Yard around 6:35 a.m., with Peckinpaugh seated on the right side of the caboose and Thomas seated on the left side (T-40, 199). The interior of the caboose was dark and noisy (T-41, 199). Some time between 7:00 and 7:20 a.m., Thomas heard the radio cut in (T-200). At this time it was just breaking dawn and was 50% darker inside the caboose then outside (T-202). It was agreed that at the time it was darker inside the caboose (T-42, 53, 54). Because of the noise the radio was starting to make Thomas intended to get up and turn the volume up (T-200). As Thomas got up he hit the light switch above his seat and a little glow was produced by the interior light.

Thomas took one step West when his foot hit water and started sliding until he hit a dry spot, suddenly stopping causing Thomas severe pain (T-200, 234, 236). Thomas, at the time of fall, was partially lying in water. Thomas picked himself up and sat in the seat and looked at his ankle and noticed that the bone in his ankle was sticking through the skin of his leg (T-200). Peckinpaugh saw Thomas stand up but did not hear or see Thomas fall. Peckinpaugh then heard Thomas moaning (T-42) and helped Thomas reduce the swelling and applied a trashbag with ice (T-42). Peckinpaugh determined, by examining Thomas' ankle with a lantern, that Thomas was seriously injured and needed help. Peckinpaugh used a walkie talkie (radio in caboose was not working) to advise the engineer of the injury

and the need for medical assistance (T-44,45).

Neither Thomas nor Peckinpaugh were aware of water on the floor of the caboose prior to Thomas' fall. After the accident water was observed on the floor of the caboose with the biggest portion being under the water cooler and under Thomas' seat (T-130, 136). Because of the battery condition, the lights in the caboose did not provide enough light to see (T-44, 53). Thomas had a hand held lantern but maintained that he did not use the lantern when he got up because the lantern was used for signaling and spotting, and was not used inside cars, or inside the caboose (T-61, 203).

Evidence showed that water came from the water cooler. The drainpipe of the water cooler would freeze and

backup the water from the cooler causing it to spill on the floor (T-49). Complaints had been made about the drainpipe freezing causing the water to flow on the floor prior to Thomas' fall (T-151, 152, 162). Railroad employees had used the railroad fusees in the past to thaw the drainpipe and pictures showed evidence of a burned drainpipe.

Hart, a car inspector, indicated that there was not enough employees at the Brewer Yard to inspect cabooses (T-160) and verified that complaints about the drainpipe freezing had been made prior to Thomas' fall (T-162). Vaughan inspected the caboose after Thomas' injury, and found water on the floor that came from the drainpipe of the water cooler (Vaughan-6). Vaughan explained that the drainpipe in the caboose would have a tendency to freeze

in cold weather and an inspection right after the accident showed that the drainpipe was frozen with icicles hanging from it (Vaughan-7, 9). A solid plug of ice in the drainpipe stopped the water draining from the drainpipe causing the water to overflow onto the floor. The Seaboard officials were aware that the drainpipes had frozen for some time, (Vaughan-15) but the Seaboard had not taken any action to stop the drainpipe from freezing (T-5, 138).

Expert opinion introduced into evidence indicated the drainpipe froze because the Seaboard used a flat fitting instead of a slope fitting pipe (T-87). Spicer, a plumber who was familiar with the condition and pipe layout of the caboose, was of the opinion that the condition of the freezing pipe could have been alleviated by using heating

tape (T-88), insulation and pipe fittings (T-89), boxing the drain (T-90), or Rubatex (T-91). Vaughan, a car inspector, was of the opinion that the drainpipe would not have frozen if a three or four inch pipe had been used.

The Seaboard offered no evidence to dispute the fact that the trainmaster ordered the caboose to leave without lights, the Seaboard knew the pipe would freeze, that the Seaboard had prior complaints about the drainpipe freezing, that the condition of the freezing drainpipe could be corrected, or that it was dark in the caboose. The Seaboard maintained that Thomas did not fall in the water and that Thomas should have used his lantern before he moved. No other explanation was given as to how Thomas was injured.

REASONS FOR GRANTING WRIT

In the past this Court, in Federal Employer Liability Act cases, has been confronted with the issue as to whether there was error in not having the case submitted to the jury and not the issue as to whether there was error in submitting the case to the jury. This Court has reviewed cases by Certiorari where the Lower Court has struck the employee's evidence and has ruled as a matter of law that either the employee was negligent, the employer was free of negligence, the employer's negligence was not causally related or there was not an employment relationship. In these cases the Court held there was error in not submitting the issue of the employee's negligence, the employer's negligence, the question of causation or the employment relationship to the

jury. See Tenant v. Peoria and Pekin Union R. Company, 321 U.S. 29, 88 L.Ed. 520, 64 S.Ct. 409 (1944); see Jesionowski v. Boston and Main Railroad, 329 U.S. 452, 91 L.Ed. 416, 67 S.Ct. 401 (1947); see Wilkerson v. McCarthy, 336 U.S. 53, 93 L.Ed. 497, 69 S.Ct. 413 (1949); see Tiller v. Atlantic Coastline Railroad Company, 318 U.S. 54, 87 L.Ed. 610, 63 S.Ct. 444 (1943); see Rogers v. Missouri Pacific P.R. Company, 352 U.S. 500, 1 L.Ed.2d 493, 77 S.Ct. 443 (1957), Reh Den 353 U.S. 943, 1 L.Ed.2d 764, 77 S.Ct. 808 (1957); see Baker v. Texas and Pacific Railway Company, 359 U.S. 227, 3 L.Ed.2d 756, 79 S.Ct. 664 (1959); see Webb v. Illinois Central Railroad, 352 U.S. 512, 1 L.Ed.2d 503, 77 S.Ct. 459, Reh Den 353 U.S. 943, 1 L.Ed.2d 764, 77 S.Ct. 809 (1957).

In contrast to the previous cases where this Court has granted Certiorari the Petitioner here is seeking Certiorari on the basis that the Lower Court should not have submitted the issue of the employee's negligence, the employer's negligence and the causation to the jury. "If reasonable men could not reach different conclusions on the issue the question may be taken from the jury." See Baker, supra. This Court should grant Certiorari because the Supreme Court of Virginia has decided an important Federal question of sufficiency of evidence which is in conflict with other decisions of the Supreme Court and other Federal decisions in interpreting the Federal Employers' Liability Act. "Only by a Uniform Federal Rule as to the necessary amount of evidence may litigants under the Federal

action receive similar treatment in all States." See Brady v. Southern Railway Company, 320 U.S. 476, 88 L.Ed. 239 at 242, 64 S.Ct. 232 (1943). The Portsmouth Circuit Court's ruling and the Supreme Court of Virginia's ruling that there was no error in submitting the question of the employer's negligence, the employee's negligence and the issue of causation to the jury was a Federal question. See Brady, supra. "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the Court should determine the proceeding by non-suit, directed verdict, or otherwise in accordance with acceptable practice without submission to the jury or by judgment not withstanding the verdict." See Brady, supra., p. 243.

It is important that this Court review this case because the Circuit Court of Portsmouth and the Supreme Court of Virginia have not followed the standard of the review of evidence as set down by this Court and other Federal Court decisions interpreting the Federal Employers' Liability Act. The Supreme Court of Virginia allowed the issue of the Seaboard's negligence to go to the jury where the uncontradicted evidence was that the interior light of the caboose was not working, that the supervisor of the Seaboard knew this and ordered the crew to leave, that the Seaboard had received complaints about the drainpipe freezing prior to Thomas' accident, that the freezing of the drainpipe caused water to overflow on to the floor, that the drainpipe could have been repaired so it would not

freeze and that the frozen drainpipe caused water to flow on to the floor. Reasonable people could only conclude from the evidence and the inferences from the evidence that the Seaboard was negligent for allowing a condition to exist causing an overflow of water on the caboose floor.

The Court also allowed the issue of Thomas' negligence to be submitted to the jury over the objection of Thomas. Thomas was told by a supervisor to ride in the car and leave the terminal with the car not having proper lights. Thomas either hit the light switch before he took his step or the light switch was already on but the light only provided a small glow. Thomas cannot assume the risk of his injury. See 45 U.S.C. Sec. 54. There was no evidence that Thomas got out of his seat improperly or was

taking an improper step or should have known that the water was there. It was agreed that it was dark inside the caboose. The Seaboard maintained that Thomas should have used his lantern but witnesses maintained that the lantern was not used for looking around inside the caboose. Thomas did not cause the drainpipe to freeze or the water to overflow. There was no evidence that Thomas knew of the water on the floor at the time he took his step, that Thomas improperly got out of his seat, or that Thomas should havc seen the water. There has been a number of Federal Circuit cases upholding the principle that the question of the employees' negligence should not be submitted to the jury if reasonable people could conclude the employee was not negligent. See Borough v. Diluth Missabe and Iron

Range Ry Company, 762 Fed.2d 66 (8th Circuit. 1985), where the 8th Circuit Court of Appeals found no evidence of contributory negligence and held it was an error to submit the issue to the jury. In Borough, the employee testified that he stepped off a moving train in a manner taught by and approved by the railroad and it was impractical for him to wait before he stepped off the train. There was no evidence from the two witnesses that Borough acted negligently and carelessly or stepped off improperly. There was evidence that the plaintiff knew of the presence of the taconite pellets on the platform might be dangerous but there was no evidence that he failed to use the proper care in alighting from the train. The Court said that if there was no evidence from which the jury could find, lack of due care by an

employee, it is generally fundamental error for the Court to give a contributory negligence instruction. See Borough, supra. In Wilson v. Burlington Northern, 670 Fed.2d 780 (8th Cir. 1982), Cert. Den. 457 U.S. 1128, 73 L.Ed.2d 1333, 102 S.Ct. 2934 (1982), the plaintiff was asked to assist in lifting a pan and injured his back. The Court held the issue of employee's negligence should not have been submitted to the jury. It was not contributory negligence for the plaintff to fail to use the jack when the jack had not been used for a year or to call for additional help. Here the plaintiff was asked to help and there was no choice involved. The Court said it is a reversible error to submit to the jury the issue of contributory negligence where there is not evidence for the jury to find a

lack of due care. See Wilson, supra., p. 784. In Morran v. Pennsylvania Railroad Company, 321 Fed.2d 402 (1963), the Court held there was no issue of the employee's contributory negligence when the employee was walking over a plank that was used for walking and it gave way. Evidence showed that the plank had become rotten on the underside but this was not visible to the employee. It is not contributory to fail to look out for danger when there is no reason to apprehend any. In Dixon v. Penn Central, 481 Fed.2d 833 (6th Cir. 1973), Dixon was in the tower and was giving a signal to operate the switch lever. The lever went half way up and stopped and the plaintiff pushed again and injured himself. Plaintiff was aware by custom to throw a switch that went that far and there was no evidence that

you would not throw the switch. The Court said that you cannot reach the jury on the issue which the defendant bears the burden of proof on nothing but the incredibility of the plaintiff's testimony. See Dixon, supra., p. 837. Finally in Paluch v. Erie Lackawanna Railroad, 387 Fed.2d 996 (3rd Cir. 1968), the railroad employee climbed a pole pursuant to the written instructions of his employer in order to cut a wire. Plaintiff was inexperienced in what he was told to do. The pole was rotten and it was held up by a stub-pole which was also rotten. The Court again said it was not contributory negligence to fail to discover a danger when there is no reason to apprehend one. Thomas had no reason to apprehend any danger in this case. The inside of the caboose was dark and Thomas went to flick on the

switch before he took a step and the light did not provide the normal lighting, which the railroad knew of before the caboose left the terminal. Thomas had no reason to apprehend that there was water on the floor as a result of the drainpipe of the water cooler becoming frozen. Thomas was not the cause of why the caboose was not well lighted and the Seaboard cannot shift this responsibility by saying that Thomas was contributory negligent by not using his lantern.

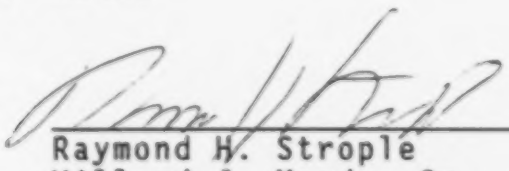
The Federal Employers' Liability Act protects the rights of the employee and the Court in allowing the issue of Thomas' contributory negligence to go to the jury and in allowing the question of the railroad's negligence to go to the jury where only reasonable men could conclude that Thomas was not

negligent and the railroad was negligent is contrary to the intent and purpose of the Federal Employers' Liability Act, that the decisions of the Supreme Court of the United States and the decisions of the other Circuits. This Court should grant this Petition of Certiorari.

CONCLUSION

WHEREFORE, for the reasons set forth above, the Petitioner respectfully prays that this Court grant this Petition of Certiorari to review the decision of the Supreme Court of Virginia.

Respectfully submitted this 1st day of June, 1988.



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Counsel for Petioner

CERTIFICATE OF SERVICE

This is to certify that I have this day served William T. Prince at Williams, Worrell, Kelly & Greer, P.C., Post Office Box 3416, Norfolk, Virginia 23514-3416 counsel for respondent by mailing three copies of the Petition for Certiorari by depositing the same in the United State mail postage prepaid this 1st day of June 1988.

Raymond H. Strople
Willard J. Moody, Sr.
MOODY, STROPLE & LAWRENCE
Post Office Box 1138
Portsmouth, VA 23705

IN THE SUPREME COURT OF
THE UNITED STATES

STEPHEN R. THOMAS,

Petitioner,

v.

SEABOARD SYSTEM RAILWAY, INC.,

Respondent.

APPENDIX

VERDICT OF THE JURY

DOCKET NO.: L-85-760

September Term, 1986

THE CIRCUIT COURT
OF THE CITY OF PORTSMOUTH

STEPHEN R. THOMAS

v.

SEABOARD SYSTEM RAILROAD, INC.

VERDICT:
We, the jury, find for the Defendant, Seaboard System Railroad, Inc.

Byron S. Walker
Foreman
11 September, 1986

ORDER OF COURT ENTERED
SEPTEMBER 11, 1986

VIRGINIA: IN THE CIRUCIT COURT OF THE CITY OF PORTSMOUTH

STEPHEN R. THOMAS,

Plaintiff,

v. AT LAW NO L85-760

SEABOARD SYSTEM RAILROAD, INC.,

Defendant.

On this the 11th day of September 1986, again came the parties in person and by their Attorneys and Court convened as of its adjournment of Wed. Sept. 10th, 1986, and the jurors sworn to try the issue again retired to their room to consult of their verdict and after sometime returned into Court having found the following verdict: "We, the jury, find for the defendant, Seaboard System Railroad, Inc., signed Byron Walker, Foreman." Sept. 11th, 1986, whereupon, the plaintiff, by counsel, moved the Court to set the verdict of the jury aside and to grant him a new trial on the grounds that said verdict is contrary to the law and evidence for reasons stated in the record, which motion being heard, is taken under

advisement by the Court and the Attorney for plaintiff is to prepare the record of this case and said case is continued generally.

ENTER 9/11/86

MOTION TO SET ASIDE VERDICT AND AWARD A NEW TRIAL

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PROTSMOUTH

STEPHEN R. THOMAS,

Plaintiff,

v. L-85-760

SEABOARD SYSTEMS RAILROAD COMPANY,

Defendant.

MOTION TO SET ASIDE VERDICT OR AWARD A NEW TRIAL

NOW COMES PLAINTIFF, Stephen R. Thomas, by counsel, and in confirmation and supplementation of his verbal motion, respectfully moves the Court to set

aside the verdict of the jury in favor of the defendant and to enter final judgment for the plaintiff, or in the alternative, to award a new trial on the following grounds;

1) The Verdict of the jury was contrary to the law and the evidence in this case and was without evidence to support it.

2) The Court erred in granting and refusing instructions to the jury.

3) The Court erred in the admission and exclusion of evidence presented.

4) The Court erred in the denial of certain voir dire offered by the plaintiff.

5) Misconduct of the Jury.

6) The Court erred in allowing improper argument by defense counsel to the jury.

6) The Court erred in denial of argument to the jury by plaintiff's counsel.

Counsel for the plaintiff will further specify particulars of said motion once the trial record has been prepared for review.

WHEREFORE, plaintiff, Stephen R. Thomas, moves the Court to set aside the jury verdict and enter final judgment for the plaintiff, or in the alternative, to award a new trial.

STEPHEN R. THOMAS

By s/Willard J. Moody

Willard J. Moody, p.q.
MOODY, STROPLE AND LAWRENCE, LTD.
Post Office Box 1138
Portsmouth, Virginia 23705

I hereby certify that the original of the foregoing pleading was this 18th day of September, 1986, mailed to William T. Prince, Post Office Box 3416, Norfolk, Virginia 23514, counsel of record for the defendant.

s/Willard J. Moody

FINAL JUDGMENT OF THE
CIRCUIT COURT OF PORTSMOUTH

VIRGINIA: IN THE CIRCUIT COURT OF THE
CITY OF PORTSMOUTH

STEPHEN R. THOMAS,
Plaintiff

vs. AT LAW NO L-85-760

SEABOARD SYSTEM RAILROAD, INC.,
Defendant.

On this the 19th day of December, 1986, came again the parties by their Attorneys and the Court having fully heard the motion of the plaintiff to set the verdict of the jury aside heretofore rendered herein and to grant the plaintiff a new trial on the grounds that said verdict is contrary to the law and evidence, which motion the Court doth overrule and judgment is entered on the verdict. It is therefore

considered by the Court that the plaintiff take nothing by his false clamor and judgment be entered on the verdict rendered on the 11th day of September, 1986, and this case be removed from the docket of this Court.

Enter 12/29/86

s/Judge

ORDER OF SUPREME COURT OF VIRGINIA
DENYING PETITION FOR APPEAL

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 25th day of January, 1988.

Stephen R. Thomas, Appellant,

against Record No. 870300
Circuit Court No. L-85-760

Seaboard System
Railroad, Inc., Appellee.

From the Circuit Court of the City of Portsmouth

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach, Clerk

By: s/R. A. Rice
Deputy Clerk

ORDER OF SUPREME COURT OF VIRGINIA
DENYING PETITION FOR REHEARING

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in

the City of Richmond on Friday the 4th day of March, 1988.

Stephen R. Thomas, Appellant,

against Record No. 870300
Circuit Court No. L-85-760

Seaboard System
Railroad, Inc., Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 25th day of January, 1988 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

s/Clerk

INSTRUCTION 1-A

The Court instructs the jury that Seaboard System Railroad, Inc. was negligent as a matter of law for permitting the condition which resulted

in the overflow of water onto the floor of the caboose that is the subject of this case. If you believe from the greater weight of the evidence that such negligence on the part of the defendant Railroad caused or contributed in whole or in part, even the slightest, to cause the injury which Stephen R. Thomas sustained on January 17, 1985, then you shall return your verdict in favor of Stephen R. Thomas and fix his damages in accordance with the other instructions of the Court.

Refused

9/10/86

s/Judge

INSTRUCTION 3-A

The Court instructs the jury that there is no evidence that Stephen R. Thomas was negligent himself in causing or contributing to cause the accident

in which he was injured, and if you find for the plaintiff, you shall not consider any such contributory negligence to reduce the amount of your verdict.

Refused

9/10/86

s/Judge

* * * * * *

THE COURT: All right, gentlemen, we will take up instructions now.

(The jury was dismissed for lunch.)

(The following took place in chambers.)

THE COURT: 1-A refused. I think it's a question for the jury. --

* * * * * *

THE COURT: All right, sir.

3-A refused on the grounds it's a jury question.